Loo Choo Teng & Anor v Cheok Swee Lee & Ors

HIGH COURT (PULAU PINANG) — ORIGINATING SUMMONS NO 24–330 OF 2000
JEFFREY TAN J
8 NOVEMBER 2000

Civil Procedure *— Judgments and orders — Variation of — Duty to obey order until set aside — Whether application to sell land at market value contrary to order should be allowed*

Land Law *— Sale of land — Sale by order of court — Failure of vendor to perform contract — Court directed specific performance — Application to sell land at market value — Duty to strictly comply with order of court — Whether vendor should be allowed to benefit from own failure*

The defendants filed an action against the plaintiffs in 1981 for specific performance of an agreement dated 8 January 1979 ('the agreement') between the plaintiffs as vendors and the defendants as purchasers for the sale of a piece of land at RM1.60 psf. The High Court ordered the plaintiffs to specifically perform the agreement. The plaintiffs appealed to the Court of Appeal. The Court of Appeal affirmed the orders of the High Court and also ordered the plaintiffs to apply to court for formal sanction for the sale of the land in accordance with cl 8 of the agreement. In the instant application, the plaintiffs applied for permission to sell the land at the market value of the land at the date of approval.

Held:

(1) The plaintiffs were ordered to apply for formal sanction to sell the land upon the terms of the agreement. It is established law that a person against whom an order of court has been issued is duty bound to obey that order until it is set aside. The court must decide on this application in strict accordance with the terms of the Court of Appeal. Outside the terms of the order of the Court of Appeal, this application for permission to sell the land at the market value of the land at the date of approval ought to be rejected in limine (see pp 222B, 223D, I–224A).

(2) Even if not rejected in limine, the plaintiffs' application could not in all fairness and justice be granted on the merits. The value of the land with passage of time and in the nature of things had appreciated, but the purchasers purchase the land in 1979 at RM1.60 psf. If the plaintiffs had performed their bargain, the purchasers could have had the land a long time ago and any appreciation in the value of the land would that of the purchasers. The plaintiffs could not be permitted to take advantage of their own failure to perform cl 8 of the agreement (see p 224B, E–F).

[Bahasa Malaysia summary

Defendan-defendan telah memfailkan satu tindakan terhadap plaintif-plaintif dalam tahun 1981 untuk pelaksanaan spesifik untuk satu perjanjian bertarikh 8 Januari 1979 ('perjanjian tersebut') antara plaintif-plaintif sebagai penjual-penjual dan defendan-defendan sebagai pembeli-pembeli sekeping tanah berharga RM1.60 kps. Mahkamah Tinggi memerintahkan plaintif-plaintif untuk melaksanakan perjanjian tersebut secara spesifik. Plaintif-plaintif telah membuat rayuan kepada Mahkamah Rayuan. Mahkamah Rayuan telah mengesahkan perintah-perintah Mahkamah Tinggi dan juga memerintahkan plaintif-plaintif memohon kepada mahkamah untuk mendapatkan kebenaran rasmi untuk penjualan tanah menurut kl 8 perjanjian tersebut. Di dalam permohonan ini, plaintif-plaintif memohon kebenaran untuk menjual tanah tersebut pada kadar pasaran pada tarikh persetujuan.

Diputuskan:

(1) Plaintif-plaintif telah diperintahkan untuk memohon sanksi rasmi untuk menjual tanah berdasarkan terma-terma perjanjian tersebut. Adalah undang-undang mantap bahawa seseorang di mana satu perintah mahkamah telah dikeluarkan mempunyai kewajipan yang terikat untuk mematuhi perintah tersebut sehingga ia diketepikan. Mahkamah mestilah memutuskan permohonan ini dengan ketetapan yang ketat dengan terma-terma Mahkamah Rayuan. Di luar terma-terma perintah Mahkamah Rayuan tersebut, permohonan untuk kebenaran untuk menjual tanah tersebut pada kadar pasaran tanah tersebut pada tarikh kebenaran sepatutnya ditolak *in limine* (lihat ms 222B, 223D, I–224A).

(2) Walaupun tidak ditolak *in limine*, permohonan plaintif-plaintif tidak dapat atas segala keadilan dibenarkan atas merit. Kadar tanah tersebut dengan kitaran masa dan secara semulajadi telah meningkat, tetapi pembeli-pembeli telah membeli tanah tersebut pada RM1.60 kps. Jika plainitf-plaintif telah melaksanakan tawaran mereka, pembeli-pembeli tersebut mungkin dapat memperoleh tanah tersebut dulu lagi dan apa-apa peningkatan dalam kadar tanah tersebut adalah kepunyaan pembeli-pembeli tersebut. Plaintif-plaintif tidak boleh dibenarkan mengambil kesempatan ke atas kegagalan mereka sendiri untuk melaksanakan kl 8 perjanjian tersebut (lihat ms 224B, E–F).]

Notes

For cases on judgments and orders generally, see 2(2) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 2724–2805.

For cases on sale of land generally, see 8 *Mallal's Digest* (4th Ed, 1999 Reissue) paras 2833–3271.

Cases referred to

Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd [1998] 1 MLJ 393 (refd)
Buttle & Ors v Saunders & Anor [1950] Ch D 193 (refd)
Cheok Swee Lee & Ors v Loo Choo Teng & Ors [1997] 4 CLJ 587 (refd)
Chuah Eng Khong v Malayan Banking Bhd [1998] 3 AMR 2729 (refd)
Hartecon JV Sdn Bhd & Anor v Hartela Contractors Ltd [1996] 2 MLJ 57 (refd)
Hock Hua Bank v Sahari bin Murid [1981] 1 MLJ 143 (refd)
Lee Lim Huat v Yusuf Khan bin Ghows Khan & Anor [1997] 2 MLJ 472 (refd)
Loo Choo Teng & Ors v Cheok Swee Lee & Anor [2000] 2 MLJ 257 (refd)
M Ratnavale v S Lourdenadin; M Mahadevan v S Lourdenadin [1988] 2 MLJ 371 (refd)
Wee Choo Keong v MBf Holdings Bhd & Anor [1993] 2 MLJ 217 (refd)

Legislation referred to

Probate and Administration Act 1959

Romesh Abraham (*Shook Lin & Bok*) for the plaintiffs.
RR Sethu (*R Rajasingam* with him) (*R Rajasingam & Co*) for the first, second, third, fourth, fifth and seventh defendants.
Ong Keng Leong (*Ghazi & Lim*) for the sixth defendant.

Jeffrey Tan J. : It must be so supposed, that this is the instant plaintiffs' application (encl 1 dated 25 February 2000) for the 'permission' of the court to sell land held under Lots 2347, 2348, 2349 and 2350, Mukim 12 Daerah Barat Daya formerly held under Lot 532, Mukim 12, South West District, Penang to the instant first to fifth and seventh defendants. The reliefs sought read as follows:

(a) that the plaintiffs be given permission to sell land previously known as Lot 532, Mukim 12, Daerah Barat Daya and now known as Lot 2347, 2348, 2349 and 2350 all in Mukim 12 Daerah Barat Daya, Penang ('the said land') pursuant to cl 8 of the sale and purchase agreement between the plaintiffs and the first to fifth [and seventh] defendants dated 8 January 1979 and in accordance with the Probate and Administration Act 1959;

(b) that the permission as aforesaid be given to the plaintiffs to sell the said land to the first to fifth [and seventh] defendants abovenamed at the market value of the said land, at the date of approval by this honourable court or at such other price as this honourable court deems fit and proper.

But this is not really the instant plaintiffs' application, in the sense that the instant plaintiffs are eager applicants applying on their own volition for the said 'permission'. Rather, the instant plaintiffs were ordered by the Court of Appeal to make an application for formal sanction for the sale of the said

land. Otherwise, for sure, this application would not have been made. If not for the order of the Court of Appeal, it is most unlikely that this application which ought to have been made but was never made by the instant plaintiffs in all these last 19 years would ever be made, would ever see the light of day.

The order of the Court of Appeal came about after full trial at the High Court and then appeal to the Court of Appeal, as follows.

In Penang High Court Civil Suit 8 of 1981, the instant first to fifth and seventh defendants (then as the first to sixth plaintiffs) filed an action against the instant plaintiffs (then as the first and second defendants), as trustees of the estate of Ong Joo Sun (deceased) ('the estate'), for specific performance of an agreement ('the agreement') dated 8 January 1979 between the instant first plaintiff and one Ong Thai Hong, as trustees of the estate and as vendors of the said land of the one part, and the instant first to fifth and seventh defendants, as purchasers of the other part.

The instant plaintiffs' pleaded defence was that the said land was the subject of compulsory acquisition, and that pursuant to the provisions of the agreement, the agreement of sale became null and void when the acquisition was not withdrawn within two years from the execution of the agreement. The instant sixth defendant, who was added on his own application as the fourth defendant, pleaded that the instant plaintiffs had no authority to enter into the agreement, and that the said land was the subject of compulsory acquisition.

At the conclusion of the trial, the High Court ordered the instant plaintiffs to specifically perform the agreement dated 8 January 1979, in that: (i) the plaintiffs are to pay the balance sum (less RM361,114.80) into court on or before 8 October 1997; (ii) the first and second defendants are to deliver the documents of title to lots 2347, 2348, 2349 and 2350 on or before the 8 October 1997; (iii) the first and second defendants, within seven days from the date of payment of the balance sum (less RM361,114.80), are to execute (and/or procure the execution) a good and registrable transfer of the aforesaid four lots, free of all encumbrances, in favour of the plaintiffs, and deliver the said memorandum of transfer duly executed to the plaintiffs' solicitors, in the event of the first and second defendants failing to comply with directions (ii) and (iii), the High Court further ordered; (iv) that the registrar of titles do cancel the present document of titles to the said four lots and issue four replacement titles to be collected by the plaintiffs; and that (v) the learned senior assistant registrar do execute the aforesaid memorandum of transfer in favour of the plaintiffs (for the judgment of the High Court, see *Cheok Swee Lee & Ors v Loo Choo Teng & Ors* [1997] 4 CLJ 587). The instant plaintiffs appealed to the Court of Appeal. The orders of the High Court were affirmed by the Court of Appeal (for the judgment of the Court of Appeal, see *Loo Choo Teng & Ors v Cheok Swee Lee & Anor* [2000] 2 MLJ 257). Pertinently, the Court of Appeal also decreed specific performance.

Except that the Court of Appeal also ordered the instant plaintiffs to apply to court for formal sanction for the sale of the said land At p 263, the Court of Appeal explained:

> The subject property belongs to the estate of a deceased. It therefore comes as no surprise that the vendors and the plaintiffs expressly required an application to court for leave to sell it. So, when one comes to deal with the question whether specific performance ought to be decreed, one is met with the question: specific performance of what? And the answer must surely be: of the vendors' obligations under the sale and purchase agreement. Among these obligations is that housed in cl 8 which requires the vendors to formally obtain the court's sanction for the sale of the subject property to the plaintiffs. However, no such application as provided by cl 8 was ever made by the vendors. It follows that the court giving formal consent for the sale is one of the conditions predicated by the sale and purchase agreement.

The Court of Appeal went on to say:

> In the present instance, it is amply clear that the learned judge failed to consider sufficiently, or at all, the effect of cl 8 when exercising his discretion to decree specific performance. This is therefore a case in which in my view warrants appellate interference. However, having regard to the special circumstances of this case it would, in any judgment, be unjust to the plaintiffs to deny them specific relief altogether. It must not be forgotten that there is here a contract for the sale of immovable property. It is the kind of obligation that statute rebuttably presumes to be incapable of being remedied by an award of monetary compensation (see s 11(2) of the Specific Relief Act 1950). Moreover, this appears to be a case where the vendors, having entered into a perfectly valid transaction went about inventing all sorts of excuses to get out of it. Having failed in their efforts, it would be quite wrong to permit them to succeed, on the strength of a mere side-wind. The main obstacle envisaged by the parties to the sale was the State's refusal to release the subject property from compulsory acquisition. That hurdle having been crossed, all that remains is the mere formality of obtaining the court's sanction for the sale. This is therefore an appropriate case to decree specific performance, not as ordered by the learned judge, but on terms.

Finally, in conclusion, the Court of Appeal pronounced:

> Having satisfied myself to the existence and the width of the jurisdiction in equity, I would vary the order of the learned judge by decreeing specific performance on terms that the vendors apply to court for formal sanction as provided in cl 8 of the sale and purchase agreement. Such application shall be made not later than seven days from the date of this judgment. In the event the vendors make default, the plaintiffs shall be at liberty to seek approval from the court for the sale of the subject property to them. Should sanction be refused by the court, it would be open to the vendors to move for the decree to be vacated on the ground of impossibility of performance. Additionally, the parties are generally at liberty to apply to the High Court for such orders or directions as may be necessary to give effect to the decree hereby granted.

Now on to the instant application, Mr Romesh Abraham for the instant plaintiffs submitted: (i) that the instant plaintiffs want sanction, but upon terms favourable to the estate, ie at the current market value; (ii) that the court will seek to protect the estate; (iii) that the court has an overriding duty to ensure that the interest of the estate is protected as opposed to the interest of purchasers who elected to purchase trust property and took the risk of sanction being refused; (iv) that the right of beneficiaries is superior

to the right of purchasers; (v) that the trustees have a duty to secure the best possible price; (vi) that the court must consider, because the property is trust property, the best possible price; (vii) that the time for determining the price is at the time of sanction, notwithstanding that the price might have been a fair price at the time of the contract; and (viii) that the court must approve the price at the current market value. Mr Abraham further stated that at the time of the contract, the trustees informed all beneficiaries but received no objections to the sale, that the instant sixth defendant (a beneficiary of the estate) agreed to the sale at RM1.60 psf, but is now objecting to the sale, that many other beneficiaries are now objecting to the sale, and, that all objections were received in 2000 Certain statements of Mr Abraham ought to be quoted in verbatim — 'the effect of the judgment of the Court of Appeal was that there was no specific performance for sale at RM1.60 psf; 'the decree of specific performance is suspended until performance of the Court of Appeal's terms. This court should not look just at the terms of the contract but also consider the current market value; 'ordering the purchasers to purchase at current market value would not be specific performance, but in view of the Court of Appeal's directions, price has become an open issue'; 'it is open to the court to give formal sanction at the current market value'.

To that, Mr KL Ong for the sixth defendant 'added and expanded': (i) that the instant sixth defendant has a right to object to the sale at RM1.60 psf ; (ii) that given the present circumstances RM1.60 psf, is no longer a reasonable price; (iii) that the court must protect the interest of the estate as a whole; and (iv) that specific performance has been ordered, but formal sanction has been left to the High Court. He concluded by saying that formal sanction should be refused.

Dato' RR Sethu (R Rajasingaro with him) for the instant first to fifth and seventh defendants submitted, inter alia: (i) that the agreement was not a conditional agreement, but was valid and binding upon the parties; (ii) that the Court of Appeal only held that formal sanction should be applied for, since cl 8 of the agreement required so; (iii) that there is no licence to reopen the decree of specific performance given by the High Court and affirmed by the Court of Appeal; (iv) that formal consent is with regard to the terms set out in the agreement; (v) that the material date for the valuation for the said land is the date of contract — 8 January 1979; (vi) that the said land was compulsorily acquired at RM1.60 psf, whereas the sale price was at RM1.60 psf; (vii) that the trustees of the estate themselves valued the said land at RM1.60 psf (indeed, see p 29 of the notes of evidence — *Cheok Swee Lee & Ors v Loo Choo Teng & Ors*); (viii) that the reason why the agreement was not performed by the vendors was because of formal consent or valuation, but because of acquisition proceedings (indeed, see p 28 of the notes of evidence — *Cheok Swee Lee & Ors v Loo Choo Teng & Ors*); (ix) that the reason for the non performance of the agreement was because of a willful refusal to apply for formal sanction, rather than any non-fulfillment of conditions; (x) that the instant plaintiffs cannot take advantage of their own wrong, (xi) that it is not open to the trustees to come to court to seek sanction on a new valuation; (xii) that the

contract cannot be rewritten in this proceedings; (xiii) that the current market value is not an issue and cannot be raised; (xiv) the trial court held that the current market value was not an issue, and the ruling is binding upon the parties; and (xv) that the formal sanction is a matter of course. A

Mr Abraham would not admit it, but clearly beyond all argument, the Court of Appeal who held that the agreement was a 'perfectly valid transaction', (also) decreed specific performance — and of what, 'of the vendors' obligations under the sale and purchase agreement' — albeit upon terms. The instant plaintiffs were ordered to apply to court for formal sanction for the sale of the said land upon the terms of the agreement The term of the agreement was the sale of the said land at RM1.60 psf. It follows, that the instant plaintiffs should apply to court, or else would 'make default', for formal sanction for the sale of the said land at RM1.60 psf. The instant plaintiffs were not ordered, and so were not sanctioned by the Court of Appeal, to apply to court for formal sanction for the sale of the said land upon 'terms' alien to the agreement. After all, the equitable relief upon terms decreed — specific performance — was to enforce against the instant plaintiffs the duty of doing precisely what they agreed by the agreement to do (see *44 Halsbury's* (4th Ed) para 401, and *Black's Law Dictionary* (7th Ed) on specific performance; see also *M Ratnavale v S Lourdenadin; M Mahadevan v S Lourdenadin* [1988] 2 MLJ 371 at p 377). Indeed, in strict accordance with the maxim, *modus et conventio vincunt legem*, the very character of the decree of specific performance, is the relief of requiring exact performance of a contract in the specific form in which it was made, or according to the precise terms agreed upon (see *Black's Law Dictionary* (6th Ed)), of specifically implementing what was agreed to be done. And courts in giving the decree of specific performance act upon the principle that express stipulations, if valid, prescribe the law quoad the contracting parties (see Broom's Legal Maxims (10th Ed) at p 472). Other than to imply such term or terms as may be necessary to render the agreement effective and complete, '… the court cannot re-write the parties' agreement' (*Law and Practice of Compromise* (4th Ed) by David Foskett p 81, and quoted with approval by the Court of Appeal in *Lee Lim Huat v Yusuf Khan bin Ghows Khan & Anor* [1997] 2 MLJ 472). What could be enforced must be what was agreed. Really, it is more than irrefragable that the decree of specific performance in the instant case could not have been, could never have been, to enforce 'terms' alien to the agreement. Rather, the plain and obvious effect of the decree of specific performance upon terms of the Court of Appeal is that, if sanction is obtained, the agreement shall be implemented exactly as was agreed by the parties, that is, at RM1.60 psf. 'Should sanction be refused by the court, it would be open to the (instant plaintiffs) to move for the decree to be vacated on the ground of impossibility of performance.' That is the pith of the decree of specific performance upon terms of the Court of Appeal who made it absolutely clear that the decree of specific performance of the High Court was varied but never set aside. B C D E F G H I

The instant plaintiffs were undoubtedly thrown a lifeline — 'should sanction be refused by the court, it would be open to the (instant plaintiffs)

to move for the decree to be vacated on the ground of impossibility of performance'. But the instant plaintiffs have not taken that lifeline. Strictly speaking, there is no application for formal sanction to sell the said land upon the terms of the agreement. Only, this application 'for permission to sell the said land at the market value of the said land at the date of approval by this honourable court, or at such other price as this honourable court deems fit and proper'. On the defence of the instant plaintiffs, the Court of Appeal observed, 'this appears to be a case where the (instant plaintiffs) having entered into a perfectly valid transaction went about inventing all sorts of excuses to get out of it'. Apparently, the instant plaintiffs were not listening, for the instant plaintiffs, in a bind being ordered to apply for formal sanction to sell upon the terms of the agreement they refused to perform, but nonetheless still not short on invention, are now attempting, by seizing unto the words 'formal sanction' without regard for the context in which it was used, to pass off this specious application 'for permission to sell the said land at the market value of the said land at the date of approval by this honourable court, or at such other price as this honourable court deems fit and proper' as the mandated application for formal consent for the sale upon the terms of the agreement.

With respect, the instant plaintiffs were ordered to apply for formal sanction to sell the said land upon the terms of the agreement. 'It is established law that a person against whom an order of court has been issued is duty bound to obey that order until it is set aside. It is not open for him to decide for himself whether the order was wrongly issued, and therefore does not require obedience. His duty is one of obedience until such time as the order may be set aside or varied' (*Wee Choo Keong v MBf Holdings Bhd & Anor* [1993] 2 MLJ 217 at p 220, per Hamid Omar LP, and quoted by the Court of Appeal in *Lee Lim Huat v Yusuf Khan bin Ghows Khan & Anor*). 'When a judgment … has been perfected … a party to the judgment … cannot reopen the matter finalized in the judgment by seeking to alter or amend it for the court would be functus officio by virtue of the ratio of *Hock Hua Bank v Sahari bin Murid* [1981] 1 MLJ 143. Once perfected, a judgment … is entitled to the obedience and respect from the parties to it …' (*Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd* [1998] 1 MLJ 393 at p 417, per Peh Swee Chin FCJ). ' … once a judge makes a ruling, substantive or procedural, final or interlocutory, it must be adhered to and may not be reopened willy-nilly' *Hartecon JV Sdn Bhd & Anor v Hartela Contractors Ltd* [1996] 2 MLJ 57 at p 66, per Gopal Sri Ram JCA).

All learned counsels agreed that there are no appeals remaining against the judgment of the High Court or Court of Appeal. Then, all orders and findings of the High Court and Court of Appeal ' … amenable to the doctrine of res judicata …' (*Chuah Eng Khong v Malayan Banking Bhd* [1998] 3 AMR 2729 at p 2757, per Peh Swee Chin FCJ) are final and conclusive, and binding on the parties inter se. All orders must be respected and must be obeyed, even, but of course, by the court. There can be no two ways about it. The court must decide on this application in strict accordance with the terms of the Court of Appeal, and there can only be one

result to this application 'for permission to sell the said land at the market value of the said land at the date of approval'. Outside the terms of the order of the Court of Appeal, this application 'for permission to sell the said land at the market value of the said land at the date of approval' ought to be rejected in limine.

But seriously, even if not rejected in limine, this application 'for permission to sell the said land at the market value of the said land at the date of approval', could not ever, in all fairness and justice, be granted on the merits. 'Permission to sell the said land at the market value of the said land at the date of approval' would be contrary to all good sense. The instant plaintiffs 'entered into a perfectly valid transaction' for the sale of the said land at RM1.60 psf. Clause 8 required the instant plaintiffs 'to formally obtain the court's sanction for the sale'. In breach of the agreement, that was not done for 19 years. For 19 years, the instant plaintiffs refused to complete the sale. And now, 19 years later, having frustrated the completion of the sale for as long as they could and having denied the purchasers their bargain for 19 years, the instant plaintiffs apply, to add insult to injury, for 'permission' to sell the said land at the current (year 2000) market value.

Frankly, this application for 'permission' to sell the said land at the current market value is most reprehensible. The purchasers could have had the said land a long long time ago. That it could not have been so was only because of the infraction of the instant plaintiffs. Throughout, the instant plaintiffs were intransigent, whilst the purchasers were made to wait, seemingly forever, until intervention by the court. Of course, the value of the said land, with the passage of time and in the nature of things has appreciated. According to the instant plaintiffs, the current value of the said land, even without vacant possession, is RM28,000,000 (see valuation report — encl 6 exh '1'). That might very well be so. But the purchasers purchased the said land in 1979, at RM1.60 psf. If the instant plaintiffs had performed their bargain, the purchasers could have had the said land, as said hereinbefore, a long, long time ago; then, any appreciation in the value of the said land would be that of the purchasers. How could the instant plaintiffs be permitted to take advantage of their own failure to perform cl 8.

At p 618 of the reported judgment (*Cheok Swee Lee & Ors v Loo Choo Teng & Ors*), the High Court held:

> In the instant case, the first and second defendants had an express duty (cl 8) to apply for that formal consent, the general duty to co-operate and not to prevent the fulfillment of cl 8 [applying *Mackay v Dick* (1881) 6 App Car 251] to act bona tide (perhaps reasonably) to procure the fulfillment of cl 8 [applying *Hudson v Buck* (1877) 7 Ch D 683]. The said agreement will be construed so far as possible in such a manner as not to permit the defendants to take advantage of the first and second defendants' failure to perform cl 8 [see *Rede v Farr* (1871) 6 M & S 121, where a tenant who had failed to pay his rent asserted that by reason of a proviso re-entry his lease was at an end. Lord Ellenborough said ' .... this provision … would be contrary to an universal principle of law, that a party shall never take advantage of his own wrong …' in *New Zealand Shipping Co v Societe des Ateliers et Chantiers de Prance* [1919] AC 1, Lord Atkins said: 'But if the stipulation be that the

A contract shall be void on the happening of an event which one party or other of them can by his own act or omission bring about, then the party, who by his act or omission brings that event about, cannot be permitted either to insist upon the stipulation himself or to compel the other party who is blameless, to insist upon it, because to permit the blameable party to do either would be to permit him to take advantage of his own wrong, in one case directly, and in the other case in a roundabout way, but either way putting an end to the contract') such that the defendants cannot rely on their own failure to apply for formal consent as bringing the agreement to an end.

Indeed, notwithstanding an express agreement between the parties, it sometimes happens that peculiar circumstances present themselves which affords ground such as mistake, misrepresentation, or unconscientious advantage, for the interference of a court, in order that the contract entered into may be so modified as to meet the justice of the case (see *Broom*'s at p 473).

Now whether the instant plaintiffs were permitted, unwittingly by the order, to apply for formal sanction, to take advantage of their own failure to perform cl 8, is not for this court, who on the stare decisis rule must submit to superior judgment and must tread on eggshells, to say. Anyway, it is all done and dusted. But this court cannot permit the instant plaintiffs to take advantage of the order to apply for formal sanction for sale upon the terms of the agreement, to turn the whole bargain upside down. The bargain was not reached in 2000. The bargain was reached in 1979. Specific performance was ordered, albeit upon terms. The instant plaintiffs were ordered to apply for formal sanction for the sale upon the terms of the agreement. Never had the purchasers agreed to purchase the said land at the current market value, There was and there is no agreement for the sale and purchase of the said land at the current market value. Logically, there could not be an application, in 1979 or in 2000, for formal sanction to sell — for where are the purchasers at that price? — the said land to the first to fifth and seventh defendants at the current market value. But still it was made. It begs the question, why? To foment a refusal of formal sanction? After all, the instant plaintiffs who 'went about inventing all sorts of excuses to get out of (the perfectly valid transaction)' were practically inducted to make an application for formal sanction. The instant plaintiffs are reluctant applicants. Formal sanction was never on their agenda. The instant plaintiffs may be applicants, but refusal of 'permission' or formal sanction would suit them fine. But then again, this could be no more than a misguided application. With respect, it is plain fiddlesticks that the first to the fifth and seventh defendants could be ordered, for that would be the combined effect of the decree of specific performance coupled with the formal sanction to sell at the current market value, to purchase at a price they had never agreed upon.

Specific performance was ordered, at RM1.60 psf. This proceedings cannot nullify that result. Sanction or no sanction must be decided, with the agreed price being the price. If the instant plaintiffs had applied for formal sanction in accordance with the agreement, RM1.60 psf would have been the price before the court, and RM1.60 psf, would have been reflective then

of the market price. As correctly said by Dato' Sethu for the instant first to fifth and seventh defendants, the trustees of the estate themselves valued the said land at RM1.60 psf. In other words, the instant plaintiffs had obtained the best price for the beneficiaries of the estate (*Buttle & Ors v Saunders & Anor* [1950] Ch D 193). Not surprisingly, the beneficiaries themselves, who were duly informed of the sale, did not object to the sale (see p 28 of the notes of evidence — *Cheok Swee Lee & Ors v Loo Choo Teng & Ors*). Mr Abraham said, and Mr Ong agreed, that at the material time the instant sixth defendant agreed to the sale at RM1.60 psf. If an application for formal sanction had been made in accordance with the agreement, there would have been no reason to refuse formal sanction. Formal sanction, as the Court of Appeal said, was '[a] mere formality ...'. Reasonably, formal sanction for the sale would not have not been given. That being the case, then on the alternate prayer of the instant plaintiffs for 'permission to sell at such other price as this honourable court deems fit and proper' (and that alternate prayer invites the court to grant formal sanction to sell upon the terms of the agreement), it is only just and equitable, so as to put the parties to the position had the agreement been performed as agreed, that formal sanction be granted for the sale of the said land upon the terms of the agreement. The reasons given for refusal of formal sanction are just not acceptable. This is not your usual run of the mill application for formal consent usually applied contemporaneously, and/or at or about the time of the proposed sale. If it is, then the current (year 2000) market value and the present objections to the price will be relevant. The agreed purchase price is not reflective of the current (year 2000) market value — how could it be and what would still be after 19 years of rapid economic development? — only because the instant plaintiffs, who fallaciously held that the agreement had become null and void when the acquisition was not withdrawn within two years from the execution of the agreement, would not apply no matter what, for formal sanction. However could the instant plaintiffs harbour hopes to profit? 'Wrong must not win by technicalities' (Aeschylus, The Eurnenides (458 BC) tr Richmond Lattimore) The instant plaintiffs must reap what they sow — the whirlwind.

For the above reasons, formal sanction is hereby granted to the instant plaintiffs for the sale of the said land upon the terms of the agreement, namely at RM1.60 psf; all other 'permission' sought is refused, and the instant plaintiffs are to bear all costs of this application.

Order accordingly.

Reported by Jafisah Jaafar